

1 KEITH E. EGGLETON, State Bar No.159842
 Email: keggleton@wsgr.com
 2 DIANE M. WALTERS, State Bar No. 148136
 Email: dwalters@wsgr.com
 3 L. DAVID NEFOUSE, State Bar No. 243417
 Email: dnefouse@wsgr.com
 4 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 5 650 Page Mill Road
 Palo Alto, California 94304-1050
 6 Telephone: (650) 493-9300
 Facsimile: (650) 565-5100
 7

8 Attorneys for Defendants
 S. Douglas Hutcheson, Amin Khalifa,
 9 Grant Burton, Dean M. Luvisa, Michael
 B. Targoff, John D. Harkey, Jr., Robert V.
 10 Lapenta, Mark H. Rachesky, M.D. and
 James D. Dondero
 11

12 UNITED STATES DISTRICT COURT
 13 SOUTHERN DISTRICT OF CALIFORNIA
 14

15 CHARLES GRAHAM, Derivatively on Behalf of)
 Nominal Defendant LEAP WIRELESS,)
 16 INTERNATIONAL, INC.,)
 Plaintiff,)
 17 v.)
 18 S. DOUGLAS HUTCHESON, AMIN)
 KHALIFA, GRANT BURTON, DEAN M.)
 20 LUvisa, MICHAEL B. TARGOFF, JOHN D.)
 HARKEY, JR., ROBERT V. LAPENTA, MARK)
 21 H. RACHESKY, M.D., and JAMES D.)
 DONDERO,)
 22 Defendants,)
 23 and)
 24 LEAP WIRELESS INTERNATIONAL, INC.,)
 Nominal Defendant.)
 25)
 26)
 27)
 28)

CASE NO.: 08-CV-0246-L-NLS

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 INDIVIDUAL DEFENDANTS'
 MOTION TO DISMISS
 PLAINTIFF'S VERIFIED
 SHAREHOLDER DERIVATIVE
 COMPLAINT**

Date: August 4, 2008
 Time: 10:30 a.m.
 Dept: 14
 Before: The Hon. M. James Lorenz

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
BACKGROUND AND SUMMARY OF ALLEGATIONS	3
A. The Individual Defendants	3
B. The Restatement	4
C. Procedural History	4
D. Summary of Allegations.....	5
ARGUMENT	5
I. APPLICABLE LEGAL STANDARDS.....	5
A. Section 10(b)/Rule 10b-5 Claim	5
B. State Law Claims	7
II. PLAINTIFF FAILS TO ALLEGE SUFFICIENTLY THAT HE HAS STANDING	7
III. PLAINTIFF’S SECTION 10(b) CLAIM SHOULD BE DISMISSED	8
A. Plaintiff’s Complaint Fails to Plead Particularized Facts Giving Rise to a Strong Inference of Scienter as to Any Defendant.....	8
1. The Mere Fact that a Financial Restatement Occurred Does Not Give Rise to a Strong Inference of Scienter.....	9
2. The Complaint Fails to Plead Particularized Facts Demonstrating Each Defendant’s Awareness of Alleged Accounting Improprieties.....	10
a. Conclusory Allegations Regarding the Positions Held by the Individual Defendants Are Insufficient to Give Rise to a Strong Inference of Scienter.....	11
b. Conclusory Allegations Regarding Receipt of Unidentified Reports and Attendance at Meetings Are Insufficient to Give Rise to a Strong Inference of Scienter.....	12
c. Plaintiff’s Allegations Regarding Signatures on SEC Filings Do Not Give Rise to a Strong Inference of Scienter.	13
3. Plaintiff’s Stock Sale Allegations Fail to Provide the Missing Inference of Scienter.	14
4. The Defendants’ Actions and Disclosures During the Relevant Period Negate an Inference of Scienter.....	17

1	IV.	THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF	
2		FIDUCIARY DUTY UNDER DELAWARE LAW	18
3	A.	Plaintiff's Allegations Fail to Provide the Requisite Level of Particularity	
4		under Federal Rule of Civil Procedure 9(b)	19
5	1.	Plaintiff Fails to State a Claim Against Outside Director Defendants	
6		Rachesky and Dondero.....	20
7	2.	Plaintiff Fails to State a Claim Against the Audit Committee	
8		Defendants.....	21
9	3.	Plaintiff Fails to State a Claim Against the Officer Defendants.	22
10	B.	Plaintiff's Allegations Are Insufficient to State a <i>Caremark</i> Claim	22
11	V.	THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT	24
12	CONCLUSION		25
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Acito v. IMCERA Group, Inc.</i> , 47 F.3d 47 (2d Cir. 1995)	15
<i>Alaska Elec. Pension Fund v. Adecco, S.A.</i> , 434 F. Supp. 2d 815 (S.D. Cal. 2006), <i>aff'd</i> , 256 Fed. Appx. 74 (9th Cir. 2007).....	10, 12, 15, 16
<i>Cede & Co. v. Technicolor, Inc.</i> , 634 A.2d 345 (Del. 1994), <i>modified in part on reargument</i> , 636 A.2d 956 (Del. 1994)	17
<i>City of Austin Police Ret. Sys. v. ITT Educ. Servs., Inc.</i> , 388 F. Supp. 2d 932 (S.D. Ind. 2005).....	16
<i>DSAM Global Value Fund v. Altris Software, Inc.</i> , 288 F.3d 385 (9th Cir. 2002)	9
<i>Dura Pharm., Inc. v. Broudo</i> , 544 U.S. 336 (2005)	5
<i>Fitzgerald, L.P. v. Cantor</i> , No. C.A. 16297, 1998 WL 326686 (Del. Ch. June 16, 1998)	24
<i>Fleer Corp. v. Topps Chewing Gum, Inc.</i> , 539 A.2d 1060 (Del. 1988)	24, 25
<i>Guttman v. Huang</i> , 823 A.2d 492 (Del. Ch. 2003)	20, 22, 24
<i>Higginbotham v. Baxter Int'l, Inc.</i> , 495 F.3d 753 (7th Cir. 2007)	17
<i>In re Affiliated Computer Servs. Derivative Litig.</i> , 540 F. Supp. 2d 695 (N.D. Tex. 2007)	13
<i>In re Alpharma Inc. Sec. Litig.</i> , 372 F.3d 137 (3d Cir. 2004)	9, 15
<i>In re BearingPoint, Inc. Sec. Litig.</i> , 525 F. Supp. 2d 759 (E.D. Va. 2007)	17
<i>In re Caremark Int'l Inc. Derivative Litig.</i> , 698 A.2d 959 (Del. Ch. 1996).....	19, 22, 23, 24
<i>In re Coca-Cola Enters., Inc. Derivative Litig.</i> , 478 F. Supp. 2d 1369 (N.D. Ga. 2007), <i>aff'd sub nom. Staehr v. Alm</i> , No. 07-11653, 2008 WL 657865 (11th Cir. Mar. 13, 2008)	23
<i>In re Computer Scis. Corp. Derivative Litig.</i> , No. CV 06-05288, 2007 WL 1321715 (C.D. Cal. Mar. 26, 2007)	7
<i>In re Cyberonics Sec. Litig.</i> , 523 F. Supp. 2d 547 (S.D. Tex. 2007)	14
<i>In re Hansen Natural Corp. Sec. Litig.</i> , 527 F. Supp. 2d 1142 (C.D. Cal. 2007)	11, 12, 13
<i>In re Hypercom Corp. Sec. Litig.</i> , No. CV-05-0455-PHX, 2006 WL 1836181 (D. Ariz. July 5, 2006).....	9, 14

1	<i>In re MIPS Techs., Inc. Derivative Litig.</i> , 542 F. Supp. 2d 968 (N.D. Cal. 2008).....	21
2	<i>In re Peerless Sys. Corp. Sec. Litig.</i> , 182 F. Supp. 2d 982 (S.D. Cal. 2002)	11, 16
3	<i>In re Read-Rite Corp. Sec. Litig.</i> , 115 F. Supp. 2d 1181 (N.D. Cal. 2000), <i>aff'd</i> , 335 F.3d 843 (9th Cir. 2003).....	16
4	<i>In re Read-Rite Corp. Sec. Litig.</i> , 335 F.3d 843 (9th Cir. 2003).....	11
5	<i>In re Sagent Tech., Inc., Derivative Litig.</i> , 278 F. Supp. 2d 1079 (N.D. Cal. 2003).....	7, 18, 19
6	<i>In re Silicon Graphics Inc. Sec. Litig.</i> , 183 F.3d 970 (9th Cir. 1999).....	6, 12
7	<i>In re Vantive Corp. Sec. Litig.</i> , 283 F.3d 1079 (9th Cir. 2002).....	9, 10, 12
8	<i>In re Verisign, Inc., Derivative Litig.</i> , 531 F. Supp. 2d 1173 (N.D. Cal. 2007).....	8, 9, 10, 11
9	<i>Lewis v. Chiles</i> , 719 F.2d 1044 (9th Cir. 1983)	7
10	<i>Lipton v. Pathogenesis Corp.</i> , 284 F.3d 1027 (9th Cir. 2002)	16
11	<i>Morgan v. AXT, Inc.</i> , No. C-04-4362, 2005 WL 2347125 (N.D. Cal. Sept. 23, 2005).....	14
12	<i>Neubronner v. Milken</i> , 6 F.3d 666 (9th Cir. 1993).....	6
13	<i>Rattner v. Bizos</i> , No. Civ.A. 19700, 2003 WL 22284323 (Del. Ch. Oct. 7, 2003).....	23
14	<i>Ronconi v. Larson</i> , 253 F.3d 423 (9th Cir. 2001)	15
15	<i>Rudolph v. UTStarcom</i> , No. C 07-04578, 2008 WL 1734763 (N.D. Cal. Apr. 14, 2008).....	14
16	<i>Sachs v. Sprague</i> , 401 F. Supp. 2d 159 (D. Mass. 2005)	18
17	<i>Scimeca v. Kim</i> , No. CV 06-0562-PHX, slip op. (D. Ariz. Aug. 28, 2007).....	8
18	<i>Seminaris v. Landa</i> , 662 A.2d 1350 (Del. Ch. 1995)	20
19	<i>Stone ex rel. AmSouth Bancorporation v. Ritter</i> , 911 A.2d 362 (Del. 2006).....	23
20	<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 127 S. Ct. 2499 (2007)	6
21	<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097 (9th Cir. 2003)	7, 18, 19
22		
23		
24	STATUTES	
25	15 U.S.C. § 78j(b)	6
26	15 U.S.C. § 78u-4(b)	6
27	15 U.S.C. § 78u-4(b)(2)	6, 8, 11
28	15 U.S.C. § 78u-4(b)(3)(A).....	6

1 Del. Code Ann. tit. 8, § 102(b)(7) 18

2 Del. Code Ann. tit. 8, § 327 7

3 **RULES**

4 17 C.F.R. § 240.10b-5 6

5 Fed. R. of Civ. P. 9(b) *passim*

6 Fed. R. Civ. P. 23.1 7

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Defendants S. Douglas Hutcheson, Amin Khalifa, Grant Burton, Dean M. Luvisa, Michael B. Targoff, John D. Harkey, Jr., Robert V. Lapenta, Mark H. Rachesky, M.D., and James D. Dondero (collectively, the “Individual Defendants”) respectfully submit this Memorandum of Points and Authorities in Support of Individual Defendants’ Motion to Dismiss Plaintiff’s Verified Shareholder Derivative Complaint. The Individual Defendants also join the motion made by Nominal Defendant Leap Wireless International, Inc. (“Leap” or the “Company”) to dismiss the Complaint for failure to plead compliance with pre-suit demand requirements.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this shareholder derivative complaint, plaintiff seeks to assert both federal and state law claims against the Individual Defendants, who are current and former officers and directors of Leap. The Court need not, however, reach these claims. As demonstrated in the motion to dismiss filed by Nominal Defendant Leap, plaintiff does not have standing to sue the Individual Defendants on behalf of the Company because plaintiff has failed to: (1) make a pre-suit demand on the Company’s Board of Directors, or (2) plead sufficient facts demonstrating that such a demand would have been futile, and thus excused. *See* Nominal Defendant Leap Wireless International, Inc.’s Motion to Dismiss Derivative Complaint and Memorandum of Points & Authorities in support thereof. If the Court grants Leap’s motion to dismiss, it need not consider the arguments made by the Individual Defendants in the instant motion. If the Court denies Leap’s motion, however, plaintiff’s Verified Shareholder Derivative Complaint (the “Complaint”) should be dismissed for failure to plead facts sufficient to state a cognizable claim under either federal or state law.

Plaintiff’s skeletal complaint is based on little more than the announcement by the Company of a financial restatement in late 2007. On November 9, 2007, Leap announced that it would be restating certain of its prior financial statements due to accounting errors. Despite the fact that the press release announcing the restatement clearly stated that an internal review had found no misconduct by Company personnel in connection with the accounting errors, several

1 class action and derivative complaints, including this action, were filed against the Company and
2 certain of the Company's officers and directors following the November 9, 2007 announcement.

3 In the Complaint, plaintiff generally alleges that the Company's restatement was due to
4 fraud and asserts both federal and state law claims against nine current and former officers and
5 directors of Leap. For the reasons set forth below, plaintiff's conclusory allegations of securities
6 fraud and breaches of fiduciary duty fail to withstand the exacting pleading requirements
7 imposed by Federal Rule of Civil Procedure 9(b), the Private Securities Litigation Reform Act of
8 1995 (the "Reform Act") and Delaware law.

9 *First*, plaintiff's Section 10(b)/Rule 10b-5 claim should be dismissed for failure to plead
10 any facts, much less particularized facts, giving rise to a strong inference that the Individual
11 Defendants acted with scienter – an essential element of a Section 10(b) claim. In lieu of
12 pleading particularized facts regarding each Individual Defendant's alleged misconduct, plaintiff
13 instead simply attempts to equate the fact that a restatement occurred with securities fraud.
14 Courts routinely have held, however, that the mere fact that a financial restatement occurred,
15 without more, does not give rise to a strong inference that any defendant acted with intent to
16 defraud. Plaintiff's failure to plead *any* facts suggesting that the Individual Defendants were
17 aware of the alleged accounting errors at the time the financial statements were issued is fatal to
18 plaintiff's Section 10(b) claim.

19 *Second*, the same lack of specificity that derails plaintiff's Section 10(b) claim is also
20 fatal to plaintiff's breach of fiduciary duty claim. In the Complaint, plaintiff attempts to plead
21 both knowing misconduct and failure to exercise proper oversight in support of his breach of
22 fiduciary duty claim. Plaintiff's allegations are deficient under both theories of liability:
23 (1) plaintiff's conclusory allegations regarding "knowing" dissemination of false financial
24 statements fail to withstand the heightened pleading requirements of Rule 9(b), and (2) plaintiff's
25 factually unsupported allegations regarding the Individual Defendants' purported failure to
26 exercise proper oversight fail to satisfy the necessary conditions for such a claim, known more
27 commonly as a *Caremark* claim.

28 *Finally*, plaintiff's claim for unjust enrichment also fails. Plaintiff fails to plead facts

1 demonstrating how any of the Individual Defendants was enriched at the expense of the
2 Company or specifying how any alleged enrichment was unjust as required by Delaware law.

3 For the foregoing reasons and as more fully set forth below, the Individual Defendants
4 respectfully request that the Court dismiss plaintiff's Complaint in its entirety.

5 **BACKGROUND AND SUMMARY OF ALLEGATIONS**

6 **A. The Individual Defendants**

7 The Individual Defendants include both current and former officers and directors of
8 Leap.

9 ***The Officer Defendants***

10 Plaintiff alleges that the Individual Defendants have served in the following positions,
11 among others, at Leap: S. Douglas Hutcheson has served as President and Chief Executive
12 Officer ("CEO") since February 2005 (Complaint ¶ 9); Amin Khalifa served as Chief Financial
13 Officer ("CFO") and Executive Vice President from July 25, 2006 until September 2007 (*id.*
14 ¶ 11); Grant Burton served as Vice President, Chief Accounting Officer and Controller (*id.* ¶ 12);
15 Dean M. Luvisa served as acting CFO and Vice President of Finance from March 2006 through
16 July 2006, acting CFO, Vice President of Finance and Treasurer from February 2005 to March
17 2006, and Vice President of Finance and Treasurer from May 2002 to February 2005 (*id.* ¶ 13).

18 ***The Director Defendants***

19 The Director Defendants identified in plaintiff's Complaint include Michael B. Targoff,
20 John D. Harkey, Jr., Robert V. LaPenta, Mark H. Rachesky, M.D, James D. Dondero, and S.
21 Douglas Hutcheson. *Id.* ¶¶ 9, 16-22. Plaintiff alleges that Mr. Targoff has served as a member
22 of the Board of Directors of Leap since 1998 (*id.* ¶ 16), Mr. Harkey has served as a director since
23 March 2005 (*id.* ¶ 18), Mr. LaPenta has served as a director since March 2005 (*id.* ¶ 19), Mr.
24 Hutcheson has served as a director since February 2005 (*id.* ¶ 9), and Dr. Rachesky has served as
25 a director "at all relevant times" (*id.* ¶ 21). Plaintiff alleges that James D. Dondero joined Leap's
26 Board in 2004 and served on the Board until September 2007. *Id.* ¶ 22.

1 **B. The Restatement**

2 On November 9, 2007, Leap announced that it would restate its financial statements for
3 the years 2004-2006, as well as its condensed consolidated financial statements for the first two
4 quarters of 2007. Complaint ¶¶ 2-3, 56. The November 9, 2007 press release stated that the
5 purpose of the restatement was to correct errors in previously reported service revenues,
6 equipment revenues, and operating expenses. *Id.* ¶ 56. The press release further stated that
7 “[t]he restatements are the result of an internal review of the Company’s service revenue activity
8 and forecasting process that was initiated by management in September 2007 and are not
9 attributable to any misconduct by Company employees.”¹

10 On December 14, 2007, the Company filed with the Securities and Exchange
11 Commission (“SEC”) its Form 10-Q for the quarterly period ended September 30, 2007. *Id.*
12 ¶ 61. The Form 10-Q included the unaudited effects of the restated financial information for the
13 affected periods and explained the nature of the errors. *Id.*

14 On December 26, 2007, the Company filed with the SEC an amended Form 10-K for the
15 fiscal year ended December 31, 2006, which incorporated the restated financial information. *Id.*
16 ¶ 62. The Form 10-K explained that the financial statements had been “restated to correct errors
17 relating to (i) the timing of recognition of certain service revenues prior to or subsequent to the
18 period in which they were earned, (ii) the recognition of service revenues for certain customers
19 that voluntarily disconnected service and (iii) the classification of certain components of service
20 revenues, equipment revenues and operating expenses.” *Id.*

21 **C. Procedural History**

22 Between November 27, 2007 and January 23, 2008, four securities class action
23 complaints were filed against Leap and several of its current and former officers and directors.
24 Two of the class action complaints subsequently were voluntarily dismissed, and the remaining
25 two actions were consolidated on May 23, 2008.

26
27 ¹ . See Declaration of Diane M. Walters in Support of Individual Defendants’ Motion to
28 Dismiss (“Walters Decl.”), Exhibit (“Ex.”) A.

1 Plaintiff initially filed his derivative complaint in San Diego County Superior Court on
 2 January 9, 2008. *Graham v. Hutcheson, et al.*, Case No. 37-2008-00075341-CU-MC-CTL.²
 3 Plaintiff voluntarily dismissed that action and re-filed in this Court on February 7, 2008.

4 **D. Summary of Allegations**

5 The gravamen of plaintiff's Complaint is that nine current and former officers and
 6 directors knowingly issued false financial statements over the course of nearly four years to
 7 allow certain officers and/or directors to sell shares of Leap stock at artificially inflated prices.
 8 Plaintiff asserts three claims under federal and state law: (1) a claim for alleged violations of
 9 Section 10(b)/Rule 10b-5 against all of the Individual Defendants; (2) a claim for breach of
 10 fiduciary duty against all of the Individual Defendants; and (3) a claim for unjust enrichment
 11 against defendants Hutcheson, Targoff, Dondero and Luvisa.

12 Plaintiff alleges that the Individual Defendants breached their fiduciary duties and
 13 violated Section 10(b)/Rule 10b-5 by "knowingly making false and misleading statements" and
 14 failing to disclose material information about Leap and its business. Complaint ¶ 2. In
 15 particular, plaintiff alleges that the "Individual Defendants, especially the Audit Committee,
 16 knew that they were not properly accounting for the Company's service revenues, equipment
 17 revenues, and operating expenses under Generally Accepted Accounting Principles ('GAAP')." *Id.*
 18 Plaintiff further alleges that the Individual Defendants sold shares of Leap stock "[b]ased on
 19 their knowledge of material non-public information regarding their misconduct." *Id.* ¶ 4.

20 **ARGUMENT**

21 **I. APPLICABLE LEGAL STANDARDS**

22 **A. Section 10(b)/Rule 10b-5 Claim**

23 Section 10(b) of the Securities Exchange Act of 1934 prohibits "(1) the 'use or
 24 employ[ment] ... of any ... deceptive device,' (2) 'in connection with the purchase or sale of any
 25 security,' and (3) 'in contravention of' Securities and Exchange Commission 'rules and
 26

27 ² Another shareholder derivative complaint is pending in San Diego County Superior Court.
 28 *See McBride v. Hutcheson, et al.*, Case No. 37-2007-00081584-CU-MC-CTL.

1 regulations.” *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (citing 15 U.S.C.
 2 § 78j(b)). SEC Rule 10b-5 prohibits, among other things, “any device, scheme, or artifice to
 3 defraud,” material misrepresentations and omissions, or “any act, practice, or course of business
 4 which operates . . . as a fraud or deceit upon any person.” 17 C.F.R. § 240.10b-5. Claims asserted
 5 under Section 10(b)/Rule 10b-5 must satisfy both the rigorous pleading requirements of Federal
 6 Rule of Civil Procedure 9(b) and the heightened pleading requirements of the Private Securities
 7 Litigation Reform Act of 1995 (the “Reform Act”).

8 To satisfy Rule 9(b), plaintiff must “specify such facts as the times, dates, places, benefits
 9 received, and other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6 F.3d 666,
 10 671-72 (9th Cir. 1993). In addition to providing the particularity required by Rule 9(b), plaintiff
 11 must also satisfy the heightened pleading requirements of the Reform Act. Enacted by Congress
 12 in 1995 as “a check against abusive litigation in private securities fraud actions,” the Reform Act
 13 imposes “exacting pleading requirements” and “requires plaintiffs to state with particularity both
 14 the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant’s
 15 intention ‘to deceive, manipulate, or defraud.’” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127
 16 S. Ct. 2499, 2501 (2007) (citation omitted); *see also* 15 U.S.C. § 78u-4(b). Complaints that do not
 17 satisfy these requirements “shall” be dismissed. 15 U.S.C. § 78u-4(b)(3)(A).

18 With respect to scienter, the Reform Act requires plaintiff to “state with particularity facts
 19 giving rise to a *strong inference* that the defendant acted with the required state of mind.” 15
 20 U.S.C. § 78u-4(b)(2) (emphasis added). In the Ninth Circuit, the “required state of mind” involves
 21 “deliberately reckless or conscious misconduct.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d
 22 970, 974 (9th Cir. 1999). Recklessness is sufficient “only . . . to the extent that it reflects some
 23 degree of *intentional or conscious* misconduct.” *Id.* at 977 (emphasis added).

24 To “qualify” as a “strong inference” of scienter, the “inference of scienter must be more
 25 than merely ‘reasonable’ or ‘permissible’ – it must be cogent and compelling, thus strong in light
 26 of other explanations.” *Tellabs*, 127 S. Ct. at 2510. In applying this standard, the court must
 27 consider “plausible nonculpable explanations for the defendant’s conduct, as well as inferences
 28 favoring the plaintiff.” *Id.*

1 **B. State Law Claims**

2 Leap is incorporated in Delaware. Complaint ¶ 8. Because Leap is a Delaware
3 corporation, plaintiff's breach of fiduciary duty and unjust enrichment claims are governed by
4 Delaware law under the internal affairs doctrine. *See In re Sagent Tech., Inc., Derivative Litig.*,
5 278 F. Supp. 2d 1079, 1086-87 (N.D. Cal. 2003) ("In general, courts in California follow this
6 rule and apply the law of the state of incorporation in considering claims relating to internal
7 corporate affairs.").

8 Where, as here, plaintiff's state law claims sound in fraud,³ they must be pled with
9 particularity under Federal Rule of Civil Procedure 9(b). *See Vess v. Ciba-Geigy Corp. USA*,
10 317 F.3d 1097, 1103-04 (9th Cir. 2003).

11 **II. PLAINTIFF FAILS TO ALLEGE SUFFICIENTLY THAT HE HAS STANDING**

12 Under both Federal Rule of Civil Procedure 23.1 and Delaware law, a shareholder plaintiff
13 has standing to assert derivative claims only if the plaintiff was a shareholder at the time of the
14 challenged conduct. Fed. R. Civ. P. 23.1; Del. Code Ann. tit. 8, § 327. In addition, a shareholder
15 seeking to assert derivative claims must also demonstrate that the shareholder has continuously
16 held shares in the Company since the time the suit was filed. *See Lewis v. Chiles*, 719 F.2d 1044,
17 1047 (9th Cir. 1983).

18 In the Complaint, plaintiff challenges conduct between August 2004 and November 2007.
19 *See, e.g.*, Complaint ¶ 34. Yet, nowhere does plaintiff allege that he has continuously held Leap
20 stock since August 2004. Instead, plaintiff conclusorily alleges only that he "was at all relevant
21 times, a shareholder of nominal defendant LEAP." *Id.* ¶ 7. Such vague allegations are insufficient
22 to allege contemporaneous ownership. *See In re Computer Scis. Corp. Derivative Litig.*, No. CV
23 06-05288, 2007 WL 1321715, at *15 (C.D. Cal. Mar. 26, 2007) (dismissing complaint under Rule
24 23.1 for lack of standing because, among other deficiencies, "the Complaint only generally
25 allege[d] that each Plaintiff 'is, and was during the relevant period,' or 'is, and was at all times

26
27 ³ *See, e.g.*, Complaint ¶ 2 (alleging that the Individual Defendants "knowingly" made false
28 statements); *id.* ¶¶ 37, 80 (same); *id.* ¶ 42 (alleging that the Individual Defendants sold shares of
Leap stock "[w]ith knowledge of their improper accounting practices and its effect").

relevant to,' a shareholder"); *In re Verisign, Inc. Derivative Litig.*, 531 F. Supp. 2d 1173, 1202 (N.D. Cal. 2007) (plaintiff must "unambiguously indicate . . . the dates they purchased [the company's] stock, and whether they have continuously owned [the] stock from the time of purchase up to the present"); *Scimeca v. Kim*, No. CV 06-0562-PHX, slip op. at 18 (D. Ariz. Aug. 28, 2007) ("[T]he Complaint must indicate when plaintiffs bought stock in [the company], and must state that they have owned stock continuously since the date of the filing of the lawsuit."), Walters Decl., Ex. D.

Because plaintiff fails to allege the dates on which he purchased Leap stock, plaintiff's Complaint should be dismissed for failure to adequately allege standing.

III. PLAINTIFF'S SECTION 10(b) CLAIM SHOULD BE DISMISSED

A. Plaintiff's Complaint Fails to Plead Particularized Facts Giving Rise to a Strong Inference of Scienter as to Any Defendant

To state a claim under Section 10(b)/Rule 10b-5, plaintiff must plead facts giving rise to a strong inference of scienter.⁴ Pursuant to the stringent pleading requirements of the Reform Act, plaintiff must "with respect to each act or omission . . . state with particularity facts giving rise to a strong inference that *the defendant* acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added). Thus, plaintiff must plead with particularity facts giving rise to a strong inference of scienter as to *each* defendant. *Id.*; *see also Verisign*, 531 F. Supp. 2d at 1207 ("It is not sufficient under the PSLRA to allege scienter against defendants as a group."). Plaintiff's barebones allegations in the Complaint fall far short of this exacting standard.

⁴ The gravamen of plaintiff's Complaint is that the Individual Defendants knowingly made misrepresentations and omissions in their public statements – that is, a Rule 10b-5(b) claim. *See, e.g.,* Complaint ¶ 2. Nevertheless, in the Section 10(b)/Rule 10b-5 cause of action (Complaint ¶ 86), plaintiff inconsistently (and in generic fashion) refers to "devices, schemes and artifices to defraud" (*i.e.*, language from Rule 10b-5(a)) and "acts, practices and a course of business which operated as a fraud and deceit" upon the Company (*i.e.*, language from Rule 10b-5(c)). In any event, it does not change the relevant analysis because scienter is an essential element of any Section 10(b)/Rule 10b-5 claim.

1 **1. The Mere Fact that a Financial Restatement Occurred Does Not Give**
 2 **Rise to a Strong Inference of Scienter.**

3 Ignoring the stringent pleading requirements of the Reform Act, plaintiff attempts to
 4 simply equate the announced financial restatement with securities fraud. Indeed, the pleaded
 5 “facts” regarding the alleged financial fraud consist of little more than long block quotes from the
 6 Company’s own public disclosures regarding the details of the restatement. *See, e.g.,* Complaint
 7 ¶¶ 56-62. It is well-established, however, that the mere fact that a restatement occurred does not
 8 give rise to a strong inference of scienter. *See DSAM Global Value Fund v. Altris Software, Inc.*,
 9 288 F.3d 385, 390 (9th Cir. 2002) (“[T]he mere publication of inaccurate accounting figures, or a
 10 failure to follow GAAP, without more, does not establish scienter.”); *Verisign*, 531 F. Supp. 2d at
 11 1207 (“[T]he mere fact that a corporation restates its financial statements does not give rise to a
 12 strong inference that any individual defendant acted with intent to defraud . . .”). Nor does the
 13 existence of weaknesses in internal controls, without more, give rise to a strong inference of
 14 scienter. To the contrary, “[p]resumably every company that issues a financial restatement
 15 because of GAAP errors will cite as the reason a lack of effective internal controls.” *In re*
 16 *Hypercom Corp. Sec. Litig.*, No. CV-05-0455-PHX, 2006 WL 1836181, at *9 (D. Ariz. July 5,
 17 2006) (dismissing complaint with prejudice for failure to allege scienter following disclosure of
 18 internal control weaknesses leading to restatement).

19 Rather, to plead facts sufficient to give rise to a strong inference of scienter in connection
 20 with the restatement, plaintiff must plead detailed facts showing that the Individual Defendants
 21 intentionally disseminated false financial statements or were deliberately reckless in connection
 22 with their dissemination. *See In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1090-91 (9th Cir.
 23 2002) (plaintiffs must “allege specific contemporaneous conditions known to the defendants that
 24 would strongly suggest that the defendants understood” at the time the financials were issued that
 25 the company’s accounting was improper); *see also In re Alparma Inc. Sec. Litig.*, 372 F.3d 137,
 26 150-52 (3d Cir. 2004). Plaintiff fails to plead any such facts.

1 **2. The Complaint Fails to Plead Particularized Facts Demonstrating**
2 **Each Defendant's Awareness of Alleged Accounting Improprieties.**

3 Plaintiff's Complaint provides no facts identifying who was involved in the accounting
4 matters at issue or how those individuals allegedly knew that the accounting treatment was
5 incorrect. Indeed, conspicuously absent in the Complaint are particularized facts demonstrating
6 that any of the Individual Defendants believed the challenged financial statements were false at the
7 time they were issued or that they sought to conceal accounting errors. *See, e.g., Alaska Elec.*
8 *Pension Fund v. Adecco, S.A.*, 434 F. Supp. 2d 815, 823 (S.D. Cal. 2006) ("Plaintiffs must allege
9 facts showing Defendants knew, when preparing the year-end financials, . . . that the receivables
10 should have been written off, but they fraudulently chose to delay the write-down."), *aff'd*, 256
11 Fed. Appx. 74 (9th Cir. 2007).

12 Notably, the Complaint does not contain a single fact regarding how, when or where
13 Messrs. Hutcheson, Khalifa, Burton, Luvisa, Targoff, Harkey, LaPenta, Rachesky or Dondero
14 became aware of alleged accounting improprieties. *See Verisign*, 531 F. Supp. 2d at 1207
15 (rejecting conclusory assertions of scienter where the complaint "contain[ed] no specific
16 allegations of contemporaneous reports or data supporting the assertions of scienter – not a single
17 facts showing what each defendant knew, when he/she knew it, or how he/she acquired that
18 knowledge"). Instead, plaintiff relies upon conclusory allegations regarding the defendants'
19 "positions" at the Company and on the Board, receipt of unspecified "weekly, monthly, and
20 quarterly reports," and attendance at unspecified "Board and Audit Committee meetings" or
21 "management meetings."⁵ Plaintiff's boilerplate allegations fail to withstand the exacting pleading
22 requirements of the Reform Act. *See Vantive*, 283 F.3d at 1087 (finding plaintiffs' "attempt to
23 establish such knowledge by advert[ing] to the defendants' 'hands-on' management style, their
24 'interaction with other corporate officers and employees, their attendance at management and
25

26 ⁵ *See* Complaint ¶ 35 ("Through their receipt of weekly, monthly, and quarterly reports,
27 attendance at Board and Audit Committee meetings, review of the Company's financial
28 statements, conversations with the Company's management, internal auditors, and external
auditors, the Individual Defendants knew that LEAP's accounting and financial reporting
practices were improper, and its internal controls were materially deficient.").

board meetings, and reports generated on a weekly and monthly basis in the Finance Department”
to be insufficient to give rise to a strong inference of scienter).

a. Conclusory Allegations Regarding the Positions Held by the Individual Defendants Are Insufficient to Give Rise to a Strong Inference of Scienter.

Courts routinely have held that conclusory allegations regarding defendants’ officer and/or Board positions are insufficient to give rise to a strong inference of scienter. *See In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 848-49 (9th Cir. 2003); *see also In re Peerless Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 993 (S.D. Cal. 2002) (“Published decisions in the Ninth Circuit hold that a complaint does not adequately plead scienter by claiming that key officers knew the true facts by virtue of their ‘hands-on’ positions and involvement in the day-to-day management of the company.”). Yet, conclusory allegations of knowledge based upon the Individual Defendants’ positions at Leap are exactly what plaintiff pleads in the Complaint. *See, e.g.*, Complaint ¶ 87 (“Through their positions of control and authority as officers and/or directors of the Company, the Individual Defendants were able to and did control the conduct complained of herein.”); ¶ 27 (“Because of their advisory, executive, managerial, and directorial positions with LEAP, each of the Individual Defendants had knowledge of material non-public information regarding the Company.”). Plaintiff’s conclusory “position” allegations fail to provide the requisite level of specificity regarding *each* defendant’s alleged participation in accounting decisions and/or the preparation of the challenged financial statements.

Nor does mere membership on the Audit Committee give rise to a strong inference of scienter. Conclusory allegations regarding board membership or membership on board committees – without particularized facts detailing each defendant’s alleged misconduct – are also patently inadequate under the Reform Act. *See, e.g., In re Hansen Natural Corp. Sec. Litig.*, 527 F. Supp. 2d 1142, 1159 (C.D. Cal. 2007) (“It also is insufficient to demonstrate a strong inference of scienter for Plaintiff to allege that various of the Individual Defendants held positions on various committees, such as the executive, audit, and compensation committees.”). Rather, plaintiff must plead particularized facts with respect to each Board or Committee member – separate and apart from generalized allegations directed at the collective bodies – that

1 give rise to a strong inference of culpable conduct on the part of each defendant. 15 U.S.C. §
 2 78u-4(b)(2); *see also Verisign*, 531 F. Supp. 2d at 1205 (holding that conclusory allegations
 3 regarding committee memberships and knowledge of false financial statements failed to “satisfy
 4 the pleading requirements of the PSLRA because plaintiffs neither specify the roles that [the
 5 former CFO] and each of the director defendants played . . . in the alleged scheme to issue false
 6 financial reports, nor allege facts giving rise to a strong inference of scienter as to *each*
 7 defendant”). Because plaintiff fails to plead *any* facts as to what each Audit Committee member
 8 allegedly knew regarding the accounting matters at issue, when he knew it or how he knew it,
 9 plaintiff’s conclusory allegations regarding membership on the Audit Committee are insufficient
 10 to give rise to a strong inference of scienter. *See Hansen*, 527 F. Supp. 2d at 1159 (“Plaintiff has
 11 failed to allege any specifics with respect to the Individual Defendants’ knowledge or an
 12 adequate description of their activities on various committees.”).

13 **b. Conclusory Allegations Regarding Receipt of Unidentified**
 14 **Reports and Attendance at Meetings Are Insufficient to Give**
Rise to a Strong Inference of Scienter.

15 Plaintiff’s boilerplate allegations of knowledge based upon receipt of unidentified
 16 internal reports and/or attendance at meetings are equally deficient. *See* Complaint ¶ 35
 17 (alleging receipt of unidentified “weekly, monthly, and quarterly reports”); *id.* ¶ 36 (referencing
 18 attendance at unspecified Board and committee meetings, management meetings, and other
 19 meetings”). Plaintiff “cannot base an inference of scienter on unspecified documents and
 20 conversations.” *Hansen*, 527 F. Supp. 2d at 1159; *see also Vantive*, 283 F.3d at 1088 (finding
 21 plaintiffs’ allegations regarding receipt of reports and attendance at meetings to be deficient
 22 where plaintiffs “failed to cite any specific report, to mention any dates or contents of reports, or
 23 to allege their sources of information about any reports” or to provide similar detail “with respect
 24 to the defendants’ attendance at meetings and their ‘hands-on’ managerial style”).

25 In order to rely on internal reports, plaintiff must “include adequate corroborating
 26 details,” including the “sources of her information with respect to the reports, how she learned of
 27 the reports, who drafted them, . . . which officers received them,” and an adequate description of
 28 their contents.” *Silicon Graphics*, 183 F.3d at 985; *see also Alaska Elec. Pension Fund*, 434 F.

Supp.2d at 831 (finding allegations of receipt of weekly and monthly reports insufficient to support a strong inference of scienter where plaintiff failed to plead “details as to the information provided in those reports or more particularly, facts indicating the reserves were too low or uncollectible receivables should have been written earlier”). Plaintiff’s Complaint contains no such details. Nor does plaintiff provide any details regarding specific communications that took place during the unidentified “management meetings” or board or committee meetings. To satisfy the Reform Act’s pleading requirements, “plaintiff must allege ‘the date on which any such communication occurred, how [Plaintiff] learned of such a communication, the form in which such contact or communication was had, or specifics concerning information provided or received during such contact.’” *Hansen*, 527 F. Supp. 2d at 1159 (alteration in original) (citation omitted). Plaintiff’s conclusory allegations regarding unspecified “meetings” and receipt of unidentified “reports” thus fail to provide the requisite level of specificity under the Reform Act.

c. Plaintiff’s Allegations Regarding Signatures on SEC Filings Do Not Give Rise to a Strong Inference of Scienter.

Plaintiff also attempts to create an inference of scienter based on the Individual Defendants’ signatures on SEC filings during the relevant period. Specifically, plaintiff alleges that the Company and the Individual Defendants knowingly disseminated false financial statements in the 2004, 2005 and 2006 SEC Form 10-Ks and that each of the Individual Defendants signed at least one of these documents. Complaint ¶¶ 51-53. Once again, however, plaintiff fails to plead particularized facts demonstrating that *any* of the Individual Defendants was aware of alleged accounting errors at the time the Forms 10-K were filed. Moreover, plaintiff fails to plead particularized facts regarding *each* defendant’s alleged participation in the preparation, drafting and/or dissemination of these documents. Plaintiff’s conclusory “signature” allegations thus fail to give rise to a strong inference of scienter. *See, e.g., In re Affiliated Computer Servs. Derivative Litig.*, 540 F. Supp. 2d 695, 702 (N.D. Tex. 2007) (noting that allegations regarding the signatures of the individual defendants on SEC forms 10-K “are not sufficient, *by themselves*, to establish scienter on behalf of those Defendants”); *Hansen*, 527 F. Supp. 2d at 1159 (rejecting

1 plaintiffs' contention that the Individual Defendants' signatures on various public filings gave rise
2 to a strong inference of scienter).

3 Nor does the "signing of quarterly certifications of financial statements mandated by the
4 Sarbanes-Oxley Act . . . without more, support an inference of scienter." *Rudolph v. UTStarcom*,
5 No. C 07-04578, 2008 WL 1734763, at *6 (N.D. Cal. Apr. 14, 2008). Plaintiff alleges that
6 Messrs. Hutcheson, Luvisa and Khalifa signed Sarbanes-Oxley certifications attesting "to the
7 purported accuracy of the financial statements contained in the 2004-2006 annual reports, the
8 effectiveness of the internal controls, and compliance with Section 13(a) of the Exchange Act,
9 when they knew that these Certifications were false and misleading." Complaint ¶ 54. Merely
10 alleging, as plaintiff does here, that a defendant signed a Sarbanes-Oxley certification – without
11 alleging particularized facts demonstrating that the defendant was aware of accounting
12 irregularities at the time the certification was signed – is insufficient to give rise to a strong
13 inference of scienter. *See, e.g., Morgan v. AXT, Inc.*, No. C-04-4362, 2005 WL 2347125, at *15
14 (N.D. Cal. Sept. 23, 2005) ("Plaintiff has not alleged particularized facts to support his claim that
15 Defendant[s] averments that he had examined the Company's internal disclosure controls and
16 believed they were adequate, were false."); *Hypercom*, 2006 WL 1836181, at *11 ("[A]n
17 incorrect Sarbanes-Oxley certification does not, by itself, create a strong inference of scienter.").⁶

18 Because plaintiff fails to plead particularized facts giving rise to a strong inference that
19 any of the Individual Defendants acted with scienter, plaintiff's Section 10(b) claim should be
20 dismissed.

21 **3. Plaintiff's Stock Sale Allegations Fail to Provide the Missing Inference** 22 **of Scienter.**

23 Plaintiff relies upon allegations of insider selling in an attempt to supply the missing strong
24 inference of scienter. *See, e.g.,* Complaint ¶ 42 ("With knowledge of their improper accounting
25

26 ⁶ *See also In re Cyberonics Sec. Litig.*, 523 F. Supp. 2d 547, 554 (S.D. Tex. 2007) ("As
27 plaintiffs again have failed to link these certifications to the alleged fraud with the particularity
28 required, the allegation that the certifications were false are merely conclusory. It simply is not
enough to argue that defendants must have known of the fraud given their positions.").

1 practices and its effect on the Company's financial statements, the Individual Defendants sold
 2 their personal shares of LEAP stock at artificially inflated prices."'). Mere allegations of stock
 3 sales by an officer or director, however, without more, do not give rise to a strong inference of
 4 scienter. Rather, plaintiff has "the burden at the pleading stage of explaining why the stock sales
 5 were unusual or suspicious;" that is, plaintiff "must show the trading was in amounts
 6 'dramatically out of line with prior trading practices, *at times calculated to maximize the personal*
 7 *benefit from undisclosed inside information.*'" *Alaska Elec. Pension Fund*, 434 F. Supp. 2d at 833
 8 (citation omitted). Plaintiff fails to satisfy this burden.

9 As an initial matter, plaintiff does not allege that Messrs. Khalifa, Burton, Harkey,
 10 LaPenta, or Rachesky sold any stock during the relevant period. The fact that many of the
 11 Individual Defendants are not alleged to have sold *any stock* during the relevant period
 12 undermines plaintiff's contention that nine officers and directors of Leap engaged in securities
 13 fraud "in order to line their own pockets." Complaint ¶ 44; *see Ronconi v. Larkin*, 253 F.3d 423,
 14 436 (9th Cir. 2001) ("One insider's . . . sales do not support the 'strong inference' required by the
 15 statute where the rest of the equally knowledgeable insiders act in a way inconsistent with the
 16 inference that the favorable characterizations of the company's affairs were known to be false
 17 when made.") (footnote omitted); *Alaska Elec. Pension Fund*, 434 F. Supp. 2d at 834-35 (same);
 18 *see also AlphaPharma*, 372 F.3d at 152 (finding that plaintiffs failed to plead facts giving rise to a
 19 strong inference of scienter where a key insider sold no shares during the class period and
 20 plaintiffs failed to plead facts demonstrating that the sales of the remaining defendants were
 21 unusual in scope or timing); *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995) ("The
 22 fact that the other defendants did not sell their shares during the relevant class period undermines
 23 plaintiffs' claim.").

24 Moreover, with respect to the four individuals who did sell stock, plaintiff fails to allege
 25 any facts, much less particularized facts, demonstrating that the sales were unusual or suspicious
 26 or inconsistent with prior trading patterns. Despite plaintiff's assertions to the contrary, the stock
 27 sales did not all occur during the same time period. *See* Complaint ¶ 46(a) ("All of these
 28 defendants' stock sales occurred during the same time period."). Rather, they occurred over the

1 course of many months. For example, the only alleged stock sale by Mr. Luvisa occurred in
 2 December 2006, while the only alleged stock sale by Mr. Targoff occurred *seven months later*.
 3 Moreover, all of the alleged stock sales occurred long before the alleged “fraud” was revealed in
 4 November 2007. *See In re Read-Rite Corp. Sec. Litig.*, 115 F. Supp. 2d 1181, 1183 (N.D. Cal.
 5 2000) (stock sales “occurring many months prior to the announcement which triggered the stock
 6 price correction upon which this action pivots, do not amount to a strong implication of the
 7 requisite scienter”), *aff’d*, 335 F.3d 843 (9th Cir. 2003).

8 Nor does the fact that certain of the stock sales occurred soon after positive earnings
 9 releases render them unusual. *See* Complaint ¶ 46(b) (“All of these defendants’ stock sales
 10 occurred soon after the Company’s positive earnings releases, which contained false and
 11 misleading statements.”). To the contrary, it merely suggests that the stock sales occurred during
 12 standard trading periods. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036-37 (9th Cir.
 13 2002) (timing not suspicious where insider sold stock following positive announcement of year-
 14 end results); *see also City of Austin Police Ret. Sys. v. ITT Educ. Servs., Inc.*, 388 F. Supp. 2d 932,
 15 951 (S.D. Ind. 2005) (“The fact that sales occurred after earnings announcements means nothing.
 16 Corporate insiders typically are barred from trading for a period of time before such
 17 announcements precisely to avoid charges of insider trading, so sales are often made after such
 18 announcements.”).

19 Because plaintiff fails to plead facts demonstrating that the Individual Defendants’ stock
 20 sales were unusual or suspicious or inconsistent with prior trading patterns, plaintiff’s stock sale
 21 allegations are insufficient to raise a strong inference of scienter. *See Alaska Elec. Pension*
 22 *Fund*, 434 F. Supp. 2d at 833 (“Plaintiffs have the burden at the pleading stage of explaining
 23 why the stock sales were unusual or suspicious.”) (citation omitted); *Peerless*, 182 F. Supp. 2d
 24 at 995-96 (finding that plaintiff’s allegations failed to give rise to a strong inference of scienter,
 25 where plaintiff failed to allege any facts to suggest that the sales were unusual or “out of line
 26 with the Defendants’ prior trading practices”).
 27
 28

4. The Defendants' Actions and Disclosures During the Relevant Period Negate an Inference of Scienter.

Contrary to plaintiff's depiction of defendants as attempting to conceal the Company's financial reporting errors, Leap proactively sought to identify the problems by conducting an internal review, and the Company promptly disclosed the results of that review to investors. As explained in the November 9, 2007 press release, the "restatements [were] the result of an internal review of the Company's service revenue activity and forecasting process that was initiated by management in September 2007." Walters Decl., Ex. A at Ex. 99.1. Management's decision to conduct an internal review contradicts any suggestion that the defendants sought to conceal the financial statement errors. *See, e.g., Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 758 (7th Cir. 2007) (noting that the Company's decision to conduct an investigation over the course of two months "demonstrat[ed] a pursuit of truth rather than reckless indifference to the truth").

Moreover, as the Company further disclosed in the press release, the restatements were "not attributable to any misconduct by Company employees." Walters Decl., Ex. A at Ex. 99.1.

The Company's actions in the Fall of 2007 were consistent with the Company's past practice of providing public disclosures regarding internal control deficiencies. Indeed, the Company's past warnings to investors regarding the internal control weaknesses that the Company faced in the wake of the Company's emergence from bankruptcy also negate an inference of scienter. *See, e.g., Walters Decl., Ex. B at 21* ("We have identified material weaknesses in our internal control over financial reporting, and our business and stock price may be adversely affected if we do not remediate these material weaknesses, or if we have other material weaknesses or significant deficiencies in our internal control over financial reporting.") (emphasis omitted); *see, e.g., In re BearingPoint, Inc. Sec. Litig.*, 525 F. Supp. 2d 759, 769 (E.D. Va. 2007) (noting that "truthful disclosures of negative information 'militate[] against a finding that [defendants] acted with a culpable state of mind'" (alterations in original) (citations omitted)).

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY UNDER DELAWARE LAW

Delaware law affords directors and officers significant protections in carrying out the duties and responsibilities associated with managing the business and affairs of the corporation. Among these protections are both statutory limitations on liability and a rebuttable presumption that their actions are made on an informed basis, in good faith and in the honest belief that the actions are in the best interests of the Company. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994), *modified in part on reargument*, 636 A.2d 956 (Del. 1994). Among other statutory protections, Delaware law permits corporations to adopt provisions that eliminate claims against directors for monetary damages for non-intentional conduct that was in good faith and not designed to derive an improper personal benefit. Del. Code Ann. tit. 8, § 102(b)(7). Leap's certificate of incorporation contains such a provision.⁷ Where, as here, companies have adopted such a provision, claims against the directors for negligent breaches of the duty of care are precluded. *See, e.g., Sagent*, 278 F. Supp. 2d at 1095 n.9. Thus, to plead a breach of fiduciary duty claim, plaintiff must allege facts demonstrating that the directors breached their duty of loyalty, acted in bad faith or engaged in intentional misconduct. Plaintiff pleads no such facts.

Plaintiff alleges that the "Individual Defendants breached their fiduciary duties by: (i) willfully ignoring the obvious and pervasive problems with LEAP's accounting and internal control practices and procedures and failing to make a good faith effort to correct the problems or prevent their recurrence; and (ii) knowingly disseminating to LEAP shareholders false financial statements." Complaint ¶ 80. Because plaintiff purports to base his claim on

⁷ *See* Walters Decl., Ex. C:

No director of this Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the General Corporation Law of the State of Delaware, or (iv) for any transaction from which the director derived an improper personal benefit.

1 “knowing[]” dissemination of “false financial statements,” plaintiff’s breach of fiduciary duty
 2 claim sounds in fraud and must satisfy the heightened pleading requirements of Federal Rule of
 3 Civil Procedure 9(b). *See Vess*, 317 F.3d at 1103-04; *Sachs v. Sprague*, 401 F. Supp. 2d 159,
 4 170 n. 15 (D. Mass. 2005) (“Plaintiffs’ claims alleging intentional breaches of fiduciary duties
 5 are subject to the heightened pleading requirements of Rule 9(b).”). Plaintiff’s allegations fall
 6 far short of satisfying Rule 9(b).

7 To the extent that plaintiff’s breach of fiduciary duty claim is also based on an alleged
 8 failure to exercise proper oversight,⁸ plaintiff’s Complaint once again falls short. Such a claim –
 9 commonly referred to as a *Caremark* claim – is one of the “most difficult” claims “upon which a
 10 plaintiff might hope to win a judgment.” *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d
 11 959, 967 (Del. Ch. 1996). “[O]nly a sustained or systematic failure of the board to exercise
 12 oversight . . . will establish the lack of good faith that is a necessary condition to liability.” *Id.* at
 13 971. Plaintiff’s Complaint fails to plead any facts establishing a “sustained or systemic failure”
 14 by the Individual Defendants to exercise oversight.

15 **A. Plaintiff’s Allegations Fail to Provide the Requisite Level of Particularity**
 16 **under Federal Rule of Civil Procedure 9(b)**

17 Plaintiff alleges that the Individual Defendants breached their fiduciary duty of good faith
 18 and loyalty by “knowingly” disseminating false financial statements and “willfully” failing to
 19 correct internal control problems. Complaint ¶¶ 36, 37, 80. As explained *supra* at III.A,
 20 however, plaintiff makes no attempt to plead particularized facts regarding each Individual
 21 Defendant’s alleged role in the accounting decisions or internal control matters at issue or in the
 22 preparation of the challenged financial statements. Instead, plaintiff simply clusters most of the
 23 Individual Defendants into two groups, labeled the “Audit Committee Defendants” (Messrs.
 24 Targoff, Harkey and LaPenta) and the “Officer Defendants” (Messrs. Hutcheson, Khalifa,
 25 Burton and Luvisa), and alleges that they collectively breached their fiduciary duties. *See*

26
 27 ⁸ *See, e.g.*, Complaint ¶ 34 (“The Individual Defendants’ failure to ensure effective internal
 28 controls at LEAP resulted in the Company materially overstating its financial results by
 improperly recognizing revenue.”).

1 Complaint ¶ 33.

2 Plaintiff's conclusory allegations fail to provide the "who, what, when, where, and
3 how" required by Rule 9(b). *See Vess*, 317 F.3d at 1103-04 (citation omitted). Indeed,
4 plaintiff's failure to plead facts regarding each Individual Defendant's alleged misconduct is
5 insufficient to satisfy the requirements of Federal Rule of Civil Procedure 8, much less Rule
6 9(b). *See Sagent*, 278 F. Supp. 2d at 1094-95 ("[P]laintiffs do not indicate which individual
7 defendant or defendants were responsible for which alleged wrongful act.").⁹ In sum, the same
8 lack of specificity that is fatal to plaintiff's Section 10(b) claim is also fatal to plaintiff's breach
9 of fiduciary duty claims.

10 **1. Plaintiff Fails to State a Claim Against Outside Director Defendants**
11 **Rachesky and Dondero.**

12 Plaintiff does not allege that outside director Mark Rachesky was an officer of the
13 Company or a member of the Audit Committee. Nor does plaintiff allege that Dr. Rachesky sold
14 any stock during the relevant period. Rather, the only allegation specifically relating to Dr.
15 Rachesky in the Complaint – other than his title of Chairman of the Board – is that, as a director
16 of the Company, Dr. Rachesky signed the Company's SEC Form 10-Ks. Merely alleging the
17 existence of Dr. Rachesky's signature on a Form 10-K, however, does not demonstrate that Dr.
18 Rachesky made false or misleading statements in breach of his fiduciary duties. *Cf. Seminaris v.*
19 *Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995) (rejecting contention that directors' signatures on
20 allegedly misleading Form 10-K demonstrated substantial likelihood of breach of fiduciary
21 duty); *see also supra* at III.A.2.c.

22 Similarly, the only allegations in the Complaint relating specifically to Mr. Dondero are
23 allegations that Mr. Dondero signed certain of the Company's Forms 10-K and sold Leap shares
24 during the relevant period. As noted above, Mr. Dondero's signature on the Forms 10-K does

25
26 ⁹ *Cf. Guttman v. Huang*, 823 A.2d 492, 503 (Del. Ch. 2003) (in analyzing demand futility,
27 noting that "[e]ntirely absent from the complaint are well-pled, particularized allegations of fact
28 detailing the precise roles that these directors played at the company, ... the information that
would have come to their attention in those roles, and any indication as to why they would have
perceived the accounting irregularities.").

1 not provide a sufficient basis from which to infer knowledge of accounting errors. As with Dr.
 2 Rachesky, plaintiff fails to plead particularized facts indicating that Mr. Dondero was involved in
 3 making any accounting decisions or in the preparation of the challenged financial statements.
 4 Also absent are any particularized facts demonstrating that Mr. Dondero's stock sales were
 5 unusual or suspicious, as explained *supra* at III.A.3. *Cf. Guttman*, 823 A.2d at 504 ("In the
 6 absence of any fact pleading that supports a rational inference that any of these directors had
 7 some basis to believe that [the Company's] financial statements were materially misleading in a
 8 manner that inflated the company's stock price, the mere fact that two of the directors sold large
 9 portions of their stock does not . . . support the conclusion that those two directors face a real
 10 threat of liability.").

11 Given the absence of any particularized allegations demonstrating misconduct, the breach
 12 of fiduciary duty claims against these defendants should be dismissed.

13 **2. Plaintiff Fails to State a Claim Against the Audit Committee** 14 **Defendants.**

15 Plaintiff asserts in sweeping fashion that the "Individual Defendants, *particularly the*
 16 *Audit Committee Defendants*, prepared and/or reviewed the 2004-2007 financial statements" and
 17 "because of their knowledge and participation in the improper accounting practices, knew that
 18 [sic] 2004-2007 financial statements were materially false and misleading." Complaint ¶ 37
 19 (emphasis added). Notably absent in the Complaint, however, are *any* facts demonstrating that
 20 any of the Audit Committee members purportedly had "knowledge" of "improper accounting
 21 practices," much less any facts demonstrating any alleged "participation" in the alleged
 22 "practices." *Cf. In re MIPS Techs., Inc. Derivative Litig.*, 542 F. Supp. 2d 968, 978 (N.D. Cal.
 23 2008) (conclusory allegations regarding membership on Audit Committee and approval of
 24 allegedly false financial statements insufficient to disqualify director defendant from considering
 25 demand where plaintiff failed to plead any facts demonstrating that the director "knew he was
 26 certifying false financial statements while on the audit committee"). As explained *supra* at
 27 II.A.2.a, plaintiff fails to plead *any* facts detailing what any individual Audit Committee member
 28 knew about any of the accounting matters at issue or when he allegedly knew it. Plaintiff's

conclusory allegations regarding mere membership on the Audit Committee are insufficient under Rule 9(b).

3. Plaintiff Fails to State a Claim Against the Officer Defendants.

Just as plaintiff's conclusory allegations regarding the Outside Director defendants and the Audit Committee Defendants fail to state a breach of fiduciary duty claim, so too does the Complaint fail to provide particularized allegations of misconduct with respect to each of the Officer Defendants. The only "facts" alleged regarding the Officer Defendants are their titles, the presence of their signatures on certain of the SEC Forms 10-K, and stock sales by two of the four Officer Defendants during the relevant period. Plaintiff fails, however, to plead any facts suggesting that any of the Officer Defendants was aware of alleged accounting errors either at the time the financial statements were issued or at the time of the alleged stock sales. *See Guttman*, 823 A.2d at 503 ("[T]he complaint cannot be fairly said to contain particularized facts providing an inference of insider trading. For example, the timing of the defendants' trades is quite disparate, having only the common pattern of coming after the filing of a certified financial statement.").

In sum, plaintiff has failed to plead particularized facts under Rule 9(b) demonstrating that any of the Individual Defendants acted in a manner that was disloyal, exhibited bad faith or acted out of self-interest.

B. Plaintiff's Allegations Are Insufficient to State a *Caremark* Claim

Just as plaintiff's factually unsupported allegations of "knowing" misconduct are insufficient to state a claim, so too are plaintiff's allegations regarding the Individual Defendants' alleged failure to exercise adequate oversight. *See, e.g.*, Complaint ¶ 33 ("[T]he Individual Defendants . . . failed to implement and maintain adequate internal control systems for the Company"); *id.* ¶ 34 ("The Individual Defendants' failure to ensure effective internal controls at LEAP resulted in the Company materially overstating its financial results by improperly recognizing revenue."). As noted *supra* at 19, this type of claim, which is based on an alleged failure to exercise proper oversight, is one of the "most difficult" for plaintiff to attempt to assert, as plaintiff must plead facts demonstrating "a sustained or systematic failure of the board to

1 exercise oversight.” *Caremark*, 698 A.2d 971. Plaintiff’s Complaint is devoid of any facts
 2 supporting a claim of a “sustained” or “systemic” failure by the Individual Defendants.

3 As explained by the Delaware Supreme Court in *Stone ex rel. AmSouth Bancorporation*
 4 *v. Ritter*, 911 A.2d 362, 370 (Del. 2006), to establish a failure of oversight claim under
 5 *Caremark*, plaintiff must plead facts that “articulate[] the necessary conditions predicate for
 6 director oversight liability: (a) the directors utterly failed to implement any reporting or
 7 information system or controls; *or* (b) having implemented such a system or controls,
 8 consciously failed to monitor or oversee its operations thus disabling themselves from being
 9 informed of risks or problems requiring their attention.” The Delaware Supreme Court further
 10 noted that under either standard, the “imposition of liability requires a showing that the directors
 11 *knew* that they were not discharging their fiduciary obligations.” *Id.* (emphasis added). Plaintiff
 12 makes no attempt to satisfy the *Caremark* standard.

13 Plaintiff does not identify any communications, documents or other facts suggesting a
 14 conscious disregard or dereliction of duties or responsibilities on the part of any of the Individual
 15 Defendants. Nor does plaintiff identify a single “red flag” that was ignored or disregarded. *See*
 16 *Stone*, 911 A.2d at 370 (affirming dismissal of complaint for failure to satisfy demand
 17 requirements; the “Court of Chancery found that the plaintiffs did not plead the existence of ‘red
 18 flags’ – ‘facts showing that the board ever was aware that [the Company’s] internal controls
 19 were inadequate, . . . and that the board chose to do nothing about problems it allegedly knew
 20 existed.’”). As noted *supra* at III.A, plaintiff offers little more than descriptions of the Individual
 21 Defendants’ positions with the Company and the fact that a restatement occurred. Plaintiff’s
 22 allegations fall far short of satisfying the *Caremark* standard and are insufficient to support
 23 plaintiff’s breach of fiduciary duty claim. *See In re Coca-Cola Enters., Inc. Derivative Litig.*,
 24 478 F. Supp. 2d 1369, 1378 (N.D. Ga. 2007) (“Just as in a general failure of oversight claim, the
 25 Plaintiff must provide particularized allegations *showing the information that the Audit*
 26 *Committee saw* and upon which it failed to act.”) (emphasis added), *aff’d sub nom. Staehr v.*
 27 *Alm*, No. 07-11653, 2008 WL 657865 (11th Cir. Mar. 13, 2008); *Rattner v. Bizon*, No. Civ.A.
 28 19700, 2003 WL 22284323, at *13 (Del. Ch. Oct. 7, 2003) (“The only information one can

snare from the Amended Complaint is that there exists a body of rules regarding the accuracy of recording and reporting financial information which may have been violated. Equally as important, I am unable, from the face of the Amended Complaint, to determine what role, if any, the Board or its members played in the internal processes of collecting and disseminating financial information.”).¹⁰

V. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT

Plaintiff separately asserts a claim for unjust enrichment against the individuals who are alleged to have sold stock during the relevant period, Messrs. Hutcheson, Targoff, Dondero, and Luvisa. *See* Complaint ¶ 83 (“Defendants Hutcheson, Targoff, Dondero, and Luvisa were unjustly enriched by their sales of their personally held and/or beneficially held shares of LEAP common stock while in possession of material non-public information concerning the Company’s pervasive violations of GAAP and accounting improprieties.”). To state a claim for unjust enrichment, plaintiff must allege facts demonstrating that (1) each Individual Defendant was enriched, (2) the plaintiff was impoverished, (3) a relationship existed between the enrichment and the loss, and (4) there was neither justification nor a remedy provided by law. *Fitzgerald, L.P. v. Cantor*, No. C.A. 16297, 1998 WL 326686, at *6 (Del. Ch. June 16, 1998). In short, plaintiff must allege specific facts demonstrating that these Defendants were unjustly enriched at the expense of Leap. *See Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del. 1988) (citation omitted) (“Unjust enrichment is defined as ‘the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.’”) (citation omitted). Plaintiff here has pleaded no facts showing that Messrs. Hutcheson, Targoff, Dondero, and Luvisa were unjustly enriched.

¹⁰ *See Guttman*, 823 A.2d at 506-07 (“In this case, the plaintiffs have not come close to pleading a *Caremark* claim. Their conclusory complaint is empty of the kind of fact pleading that is critical to a *Caremark* claim, such as contentions that the company lacked an audit committee, that the company had an audit committee that met only sporadically and devoted patently inadequate time to its work, or that the audit committee had clear notice of serious accounting irregularities and simply chose to ignore them or, even worse, to encourage their continuation.”)

As demonstrated *supra* at III.A.3, plaintiff has not alleged any facts demonstrating that the stock sales were unusual or suspicious. More importantly, plaintiff fails to plead facts explaining how Messrs. Hutcheson, Targoff, Dondero, and Luvisa were unjustly enriched *at the expense of Leap* as required by Delaware law. *See Fleeer*, 539 A.2d at 1062 (“Before the court may properly order restitution, it must find that the defendant was unjustly enriched at the expense of the plaintiff.”) (footnote omitted). The alleged stock sales involved open market purchasers. Leap was not a party to the challenged transactions and thus was not harmed by these transactions. Because plaintiff fails to identify the requisite enrichment and corresponding impoverishment, plaintiff’s claim for unjust enrichment against Messrs. Hutcheson, Targoff, Dondero, and Luvisa also fails.

CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court grant their motion and dismiss the Complaint.

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Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
Keith E. Eggleton
Diane M. Walters
L. David Nefouse

By: s/ Diane M. Walters
Diane M. Walters
Email: dwalters@wsgr.com

Attorneys for Defendants
S. Douglas Hutcheson, Amin Khalifa, Grant
Burton, Dean M. Luvisa, Michael B. Targoff,
John D. Harkey, Jr., Robert V. Lapenta, Mark
H. Rachesky, M.D., and James D. Dondero